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MEALEY'S TOBACCO LITIGATION CONFERENCE
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Introduction

I have summarized below the contents of each of the speeches given at the Mealey's Tobacco Litigation Conference. Other than the talks on the Minnesota Litigation, Targeting Minors & HBI (Nos. 5, 6 & 8 below), little was said that was particularly new or remarkable. The standard of the speeches (especially on the first day) was surprisingly low, and there were many muttered complaints from the other attendees!

The most noteworthy issue was the extent to which all the speakers referred to the Brown & Williamson documents (as referred to in the Meehan Memorandum & in an article in the July issue of the Journal of the American Medical Association, as well as the ammonia documents recently mentioned in the Washington Post). The speakers saw these documents as "the tip of the iceberg" of suppressed research by the tobacco companies, and thought

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that the discovery of the documents' existence marked a turning point for future litigation.

1. Historical View of the Litigation - J.D. Lee

The focus of this opening talk was Lee's own career in tobacco litigation, and two articles he had written in 1985 and 1995 which were reprinted in the conference materials.

Lee ran through his own life history, as a smoker from a tobacco farming family, through his "conversion" after having seen a film on the alleged health effects of smoking in 1958. He described his withdrawal from smoking at this time in graphic terms (his "mouth broke out", he was nauseated, etc.). He subsequently took on the tobacco companies in numerous pieces of litigation, and continues to do so. He constantly described smoking as "the socialization of an American tragedy".

He dealt with the extent of cigarette advertising in some detail. He voiced a particular objection to billboard advertising, which enables the tobacco companies to convey their basic message, without allowing passers-by time to read the Surgeon General's warning. He then ran through a number of statistics based on the fact that the industry allegedly spends $16.5 million per day on advertising. (For example the industry spends $13,700 per

day on each person who dies of a smoking related disease, or $5,500 per teenage smoker.)

He discussed the addiction issue broadly with reference to his own experience, statistics from various health organizations, and the evidence of two of the plaintiff's experts in the Castano litigation (in which he acted for the plaintiff). He compared this to the evidence given under oath by the heads of the six tobacco companies before the Waxman Committee that cigarette smoking was not addictive.

He concluded by discussing the July 1995 issue of the American Medical Association Journal, which dealt in detail with the Brown and Williamson documents on addiction. He suggested that this could be a turning point in the litigation in relation to smoking and health issues, and encouraged the public and government to get involved in a further search for information.

2. State of Tobacco Litigation in the U.K -- Martyn Day

Day began with a general discussion of the origins of the tobacco industry in the U.K. and the U.S., and discussed Margaret Thatcher's links with Philip Morris. He felt that the U.K. and the U.S. were responsible for promoting this "curse" worldwide, especially in the developing countries and held Philip Morris and BAT particularly to blame for this.

He compared the U.S. and U.K. legal systems, and attempted to explain why the UK was so far behind the U.S. in that the first group action was just beginning. He had decided that the time was right to bring an action in the U.K. after the Cipollone decision in 1992. It had not been possible before this time, because:

(i) the concept of group actions had only recently been accepted in the U.K. courts (since the early 80's);

(ii) there is a natural conservatism among British lawyers in relation to this kind of case, as it is not possible to work for conditional fees;

(iii) there had been a tremendous sea change since 1990 in relation to smoking attitudes in the U.K., mainly due to the perceived dangers of ETS.

He then described the following features of the U.K. system:

(i) costs follow the event (i.e., the losing party pays the other side's legal costs);

(ii) the legal aid system -- to qualify, plaintiffs have to be sufficiently poor (about 30-40% of the population are entitled to legal aid) and have a good case;

(iii) civil trials of this nature are tried before a single judge, not a jury;

(iv) one judge would be allocated to deal with a group action -- there would therefore be one effective judgment for the whole group all over the U.K.

Having decided to go ahead, he advertised for suitable cases. He then had a series of dealings with the Legal Aid Board over some three years. He was estimating

that the total cost of the litigation would be in the region of $10 million. He was initially refused legal aid, and was refused again on appeal. He was then successful in an action for judicial review of the LAB's decision. The case was remitted back to the LAB, and legal aid was granted for the initial stages of the action. He is currently taking evidence from experts, to convince the Legal Aid Board to allow him to go to trial. He is hoping to commence litigation in the early part of next year.

Day explained that he had recently met with Lord Woolfe (who is currently responsible for reforming civil litigation procedure in the U.K.). Woolfe was concerned, having discussed the matter with authorities in the U.S., that allowing class actions would lead many companies and industries to bankruptcy. Day had told him that he thought this concern was exaggerated.

He was then asked to run through U.K. discovery obligations. He thought that it would be hard for the tobacco companies to suppress documentation, as so much had already come out in public in the U.S. and in the media. Also, as there would be an assigned judge throughout, the tobacco companies would not want to prejudice the outcome of the trial by appearing too difficult in interlocutory applications.

He mentioned that there was no U.K. equivalent of producing documents "under seal". Documents in any case are

produced subject to an implied undertaking of confidentiality, and cannot be used in other litigation, even litigation concerning the same parties. Any breach of this obligation is a contempt of court. Documents produced in discovery in the U.K. could therefore not be used in U.S. litigation, unless and until they were read out or referred to in Court. He also discussed briefly the extent to which computerized discovery and imaging were being used in the U.K., and the possibility of using video recorded evidence in Court in certain circumstances.

He was asked who the defendants were to be in the U.K. litigation, and replied that no final decision had been made. They would definitely be suing the two main tobacco companies (Imperial and Gallaghers), but may also join in the three other players in the U.K. market (BAT, PM and one other).

He briefly discussed two other U.K. ETS cases against local authorities, which have been settled in favor of the plaintiffs. There had also been two Australian ETS cases, one involving a worker's compensation claim and the other an advertising ban, where plaintiffs had been successful. However, there had been no litigation on smoking and health issues in which the tobacco companies had lost or settled.

3. The British American Connection
-- Peter Pringle

Pringle is an English journalist and basically gave a historical overview of the history of the tobacco industry from the 16th century to the present day. He made very little reference to the litigation and was plainly a nervous and inexperienced speaker.

The only real point of interest was when he compared the different approach taken by the U.K. companies on smoking and health issues. For example Jim Green, the research director of BAT, had admitted from very early on (late 50's) that there was a possible link between smoking and cancer. This admission was based on his view that the scientific position could only become more damaging over time. Green had also said that there was no point in the tobacco companies doing "mouse research", as this was being done more effectively by the scientific organizations. The best course was a frank acknowledgment of the possible link and to attempt to produce a "safe" cigarette. However when this "acknowledgment" was expressed publicly, it was moderated considerably. The U.K. tobacco companies stated that they were not competent to judge on the science, and recognized that some authorities thought that there was a link but that others did not. There was a need for further research to which the industry would contribute. This was very similar to the U.S. position, if a little more guarded.

He concluded by referring to the Brown and Williamson documents mentioned in the Meehan Prosecution Memorandum (pages 340-342 of the conference materials).

4a. Insurance Update -- Robert Carter and Andrew Reidy

This talk was extremely dry and of little interest. Reidy and Carter briefly discussed the fact that future actions may be brought against PR companies, advertisers and lawyers, so that their insurance coverage would also have to be considered, but concentrated on possible coverage of the tobacco companies.

They discussed various possible types of insurance liability, but concentrated on comprehensive general liability, and its four components (property damage, bodily injury, advertising injury, personal injury).

The majority of the talk was taken up with examining specimen clauses on the overhead projector, and examining any possible ambiguities in the language.

4b. Insurance Update -- Steven Marcus

Marcus thought that it was uncertain whether there would ever be any coverage litigation. To date, the tobacco companies had always been successful, and plaintiffs still had only fragments of information as to the overall picture. However, he thought that the Brown and Williamson documents were "a keyhole" which may change this position.

There was also considerable legal uncertainty -- for example the Castano case was the largest class action ever, and it was uncertain whether the class would be certified on appeal. There was doubt as to whether the legal system could handle cases of this nature, and also public policy concerns as to whether cases should be allowed to continue where the potential liabilities were so large that defendants would have to bet whole companies or industries on the outcome of a jury verdict. The state Medicaid cases were also advancing new legal theories -- for example as the extent to which a state's Attorney General can stand in the shoes of an individual.

In the event that plaintiffs and insurance companies are forced to confront issues of coverage (i.e. if the tobacco companies lose), there were two main obstacles to coverage being made available:

(i) anecdotal evidence that in the 50's and early 60's there were tobacco exclusions in policies purchased by the tobacco companies;

(ii) the fact that the very allegations made in the litigation contain the seeds of defeat for the companies in attempting to obtain coverage.

In relation to the tobacco exclusions, it was not commonly known how widespread these were or how many variations there were. It was generally thought that the tobacco companies were not insured for liability for damages resulting from the use of tobacco products. These clauses

may in fact have been drafted by the tobacco companies to prevent the insurance companies from having a right to participate in and shape any tobacco related litigation. If these exclusions had indeed been drafted by the tobacco companies, this had an important legal significance in that any ambiguities would be construed against the party who drafted the clause.

The second obstacle was the extent of the tobacco industry's knowledge and the risks associated with their products. Although there had been much discussion as to whether knowledge would be construed as a matter of subjective or objective intent, Marcus thought that this issue was irrelevant, as the plaintiffs should concentrate on proving what the tobacco companies actually knew, not what they ought to have known. He emphasized that, in order to void any possible coverage, the companies did not have to anticipate the specific damage caused, just some damage (i.e. it would not matter if the damage caused was more widespread or a disease of a more serious nature than the tobacco companies had anticipated).

He then examined the complaints in the Castano action and others, and also the FDA Report.

The evidence suggested that:

(i) in the early 50's certain scientists [such as Doll, Wynder, etc.] demonstrated a link between smoking and cancer. The tobacco companies, through the PR firm of Hill & Knowlton, devised a strategy to mislead the

public by creating CTR, knowing all the while that the scientists' allegations were true.

(ii) The tobacco companies during this time conducted their own studies and confirmed the scientists' findings.

(iii) The Surgeon General's report then demonstrated a causal relationship. This was followed by a stream of publicly available research and information on the smoking and health issue.

The FDA says that the tobacco companies knew that nicotine had the properties of an addictive drug and, secondly, that they conducted studies to find the required optimum dosage. Thirdly, the FDA alleges that the tobacco companies developed technology to ensure that cigarettes delivered this dosage. Fourthly, they allege that nicotine levels were manipulated accordingly.

If any of this could be proved, the tobacco companies would not be able to recover from their insurers. He did not deal with coverage of other possible defendants in any detail, beyond saying that he thought it unlikely that the PR companies or Kimberley-Clark would have tobacco exclusion clauses.

5. The Minnesota Litigation -- Roberta Walburn

Walburn was representing both the state and Blue Cross, the largest purchasers of public and private health care in the state, in this litigation. She was an impressive speaker and handled questions very adeptly.

She briefly ran through the nine causes of action in the litigation as follows: one cause of action was based on the undertaking by the tobacco companies of a special duty (this was assumed from the Frank Statement and from the industry's other public statements); two causes of action were based on the Minnesota antitrust legislation (based on the conspiracy to suppress research and the failure to disseminate information - Minnesota antitrust legislation was very broad and allowed standing to persons injured indirectly by antitrust practices); four consumer fraud counts; and two restitution claims. There was also a broad conspiracy claim, which was not a cause of action, but was a means by which the tobacco companies could be held vicariously liable.

She discussed the discovery process in some detail, and said that they were working on the premise that the documents that had previously been made available in other litigation were only the "tip of the iceberg". She expected that this would be a long and difficult process, but the plaintiffs would be persistent.

A discovery request submitted last June was the most comprehensive ever served on the tobacco industry. It included documents relating to general research on smoking and health, "safe" cigarettes, nicotine addiction, targeting minors, market research and advertising, and FTC testing for tar and nicotine. The plaintiffs had been told to expect

over 20 million documents. All of these were to be placed in a depository in Minneapolis, which was to be administered by a third party. The costs of running the depository were to be shared pro rata between the parties.

She said that anyone was welcome to look at these documents, but that they were currently subject to a qualified protective order. She thought that they would be made accessible to other litigants and to government agencies. The defendants production was to be made on a rolling basis over a year. The plaintiffs would begin reviewing the first of these documents in a couple of weeks' time.

There was also a second depository in England, just outside London, for documents produced by BAT industries. They were being sued as the parent company of American Tobacco and Brown and Williamson, and were the only parent company to be sued in this litigation. They had taken the decision to sue them because of the information that had surfaced in relation to the Brown and Williamson research during the Waxman hearings and subsequently.

The U.K. depository was administered by BAT, who had estimated that they would be producing over six million documents. Most of these documents had been collected some 10 years ago by solicitors in the U.K., as litigation had then been anticipated. The documents were fully indexed at this time. There were already more than a million documents

in the depository and there were teams of U.S. lawyers over there currently reviewing them. So far their belief had been confirmed that the documents in the public domain to date had been only the "tip of the iceberg".

There was a framework of court orders in place to make the discovery task more manageable. Each party was to produce an index of basic objective information in relation to each document on a computer disk. There were also special procedures for identifying privileged documents. The plaintiffs wanted a Special Master to supervise the process. This had been denied so far, but the plaintiffs were still pressing for it as they considered it necessary.

The plaintiffs had obtained a court order whereby all filings in the litigation are performed electronically on a system called CLAD, which is linked to LEXIS. Filing at court and service on all other parties is therefore made automatically. The defendants were opposed to this, as it makes all filings publicly accessible, but the court ordered it nonetheless.

She was currently seeking computerized document indices from all the defendants' lawyers which had been made before the litigation commenced. Most companies appeared to have done this task in the early to mid 80's, possibly in anticipation of the Cipollone litigation. This appeared to have been a complex and voluminous task. For example, RJR had said that it had paid $90 million [?] to create its own

index. The industry was strongly resisting production of these indices, on the basis that they were privileged, as "attorney work product devices". They were currently being reviewed in camera by a Recorder. The plaintiffs had therefore asked only for any objective information contained in the indices, with any attorney comments being redacted. The defendants had said that this could not be done.

She concluded by saying that she expected this to be a laborious process, which the defendants would attempt to block every step of the way. However she intended to be persistent and obtain all the necessary documents.

6. Industry Conduct/Targeting Minors
-- Andy Berly

Berly discussed the industry "propaganda machine" comparing it with that of the asbestos industry. The PR campaigns for both had been managed by the PR company Hill and Knowlton.

He then ran through certain internal documents of the tobacco companies showing that smoking was addictive and contradicting the idea presented in previous litigation that smokers smoked from choice. He referred in particular to the Brown and Williamson documents (as per the Meehan Prosecution Memorandum), the Dunn Memo "Motives And Incentives In Cigarette Smoking" (at page 135 of the materials) and some Kimberley-Clark advertisements (at pages 154-155 of the materials). He also referred to the recent

article in the Washington Post on Brown and Williamson's use of ammonia in cigarette production.

He then ran through some "addiction statistics", and concluded that 74-90% of all smokers were addicted. He suggested that the "habituation" language of the early Surgeon General's Report and some of the tobacco industry documents was just an issue of semantics. He showed a slide on the overhead projector, settling out many of the more toxic components of cigarette smoke [e.g. formaldehyde and polonium].

He then moved on to discuss youth smoking, stating that 1/3 of the teens who start smoking die of tobacco related illnesses. Statistics showed that 62% of smokers had started before the age of 16, and 89% had started by the age of 18. If the tobacco industry was to be believed, they were targeting their advertising at the remaining 11% of the smoking population.

He considered the advertising strategies of the major tobacco companies, and mentioned the following points in particular:

(i) the top five billboard advertisers were all cigarette companies;

(ii) the use of merchandising, especially in relation to Camel and Marlboro cigarettes, whereby "if you smoke enough, you get free gifts";

(iii) sport and culture sponsorships where Philip Morris was the leader in the field, which

effectively got around the TV ban on advertising;

(iv) video games put out by Camel and Marlboro;

(v) advertising in developing countries -- e.g. free Camel cigarettes given to school children in Argentina, and concerts by pop music artists in Taiwan where the entrance fee was to be paid in empty Winston packets;

(vi) the targeting of minority groups -- especially Hispanics and African Americans. RJR had recently designed and marketed a cigarette called "Uptown" specifically aimed at the African American market, with a delivery of 19 mg of tar. This had been dropped under pressure. There had also been a similar story with RJR's brand "Dakota" which was apparently aimed at "virile females" -- defined as "those females who looked up to Roseanne"!

He concluded by showing the extent to which the tobacco industry has specifically studied youth smoking habits, which had presumably led to the above advertising strategies. He showed on the overhead projector a document called "Youth Target -- 87" from RJR in Canada. This studied the smoking habits of 15-17 and 18-21 year olds to identify strategies for this "emerging adult market".

7. "Its the Tobacco Industry, Stupid!"
-- Matt Myers

This talk focused on tactics to put the tobacco industry on trial, other than focusing on the plaintiff's smoking habits. Myers went through previous trials (such as Cipollone and Horton) where the majority of the time was spent looking at the types of cancer involved, causation issues and the habits and personality of the plaintiff.

More recently documents incriminating the tobacco industry (such as the Brown and Williamson documents) had come out. In the recent [Cuyper?] trial virtually none of these incriminating documents were introduced, but there was a dramatic change in the attitude of the jury because they were broadly aware of their existence. This case had been a much closer call for the defendants, even though very few of those documents were actually in evidence. There would need to be a major change in tactics in future litigation to examine whether the tobacco industry had been straight with the public and to examine their role in contributing to scientific understanding. He quoted parts of the judgment of the first instance judge in the Haines litigation, when he had reviewed the privileged/special project documents.

Future cases would look different in the following ways:

(1) Causation

As usual the tobacco companies would say that all smokers knew of the risks, and it was therefore unfair to hold the tobacco companies to blame. They would rely on the Frank Statement and all subsequent pro-industry research to show that they were committing themselves as an industry to find out the link between smoking and health, but that the evidence was not conclusive.

Plaintiffs could show that the industry had made many announcements and given frequent congressional

testimony that no link between smoking and certain health risks had been proved. Plaintiffs were now in a position to point to a 40 year campaign of misinformation by the tobacco companies, during which time their own documents showed the research that they were doing, and that they were years ahead of the 1964 Surgeon General's Report and had previously reached the same conclusions. Plaintiffs could say that, despite their own assumption of risk, they believed the tobacco companies when they had said that current research was not conclusive, and that they would spend the money to find the truth. In fact they already knew of all the damaging evidence when issuing the Frank Statement and forming CTR. It was plain that the intention behind CTR was never to tell the truth. Why would lawyers be guiding the research if the intention was anything other than to provide a defense for the industry?

(2) "Smokers are Adults"

The industry has previously stated that smokers make an informed choice and the industry does not encourage children to smoke. It relies on the fact that it adopted its own advertising code in 1964, and agreed with Congress five years later to remove advertising from the TV. Philip Morris also stated that they would honor the spirit of this agreement, not just the letter, and not sponsor sports on television. The industry also agreed to take steps to

reduce youth access -- i.e. to ensure that there were no free cigarettes given to minors.

All this time, Philip Morris was in fact redesigning Marlboro, which had previously been intended to appeal to women, to produce wider youth appeal. The advertisers and market research people responsible for the cowboy campaign have specifically stated that it was intended to appeal to adolescents.

As for Philip Morris' pledge not to sponsor sports, they continue to promote the Virginia Slims tennis tournament and to cover motor racing tracks with Marlboro advertisements. It was no coincidence that the introduction of Virginia Slims in 1968 coincided with the biggest ever rise in smoking in teenage girls from the years 1968-1975.

The Joe Camel campaign was specifically aimed at minors. In 1988 before the introduction of this campaign, Camel had less than 0.5% of the youth market. In three years this had grown to a third of the market, and also to a marked general increase in teenage smoking. This cigarette was now the number two best seller in the U.S., and most of the consumers were in the youth market. By far the majority of teenage smokers smoked Marlboro, Camel or Newport, the most heavily marketed brands. He then discussed statistics showing that almost every new smoker is a child, and that the starting age for smokers was getting younger and younger. He referred back to the documents shown by Andy

Berly in his earlier talk about marketing campaigns to children.

(3) Is it Fair to Make the Industry Pay for the Decisions of Consenting Adults?

This was the way that previous trials had been phrased. It would not hold up in the future when jurors examined what the industry knew when and what they had done about it. Plaintiffs also had to make clear the market at which the industry's efforts were directed -- they were deceiving and exploiting children.

The evidence shows that some 20 years before public health officials had shown smoking to be addictive, the individual companies knew that and even understood the mechanisms in the brain which caused the addiction. They therefore altered their product to produce the required effect accordingly. Laboratories in Geneva had tested nicotine effect on the CNS and receptors in the brain some 20 years ago. Internal documents showed that industry officials knew they were selling nicotine, and that the cigarette was the best delivery device. When compared to the Waxman testimony of the officials, all of this spoke for itself.

8. The Industry's "Inspection" of Federal Buildings -- Alexander Pires

Pires outlined the Seckler "qui tam" litigation in Washington Federal Court.

The story began with a vent cleaning company called ACVA, run by Gray Robertson. Stories differed as to whether he stumbled across the Tobacco Institute when cleaning vents in the TI building, or whether the TI actually went to look for him. There was certainly a memorandum from Shook Hardy & Bacon recommending Robertson to the President of the Tobacco Institute. After becoming involved with that tobacco industry group, the company grew in a short space of time from three or four people to 30 odd employees.

Pires referred briefly to the JAMA article on ETS mentioned by previous speakers. Robertson was important because he repeatedly said that ETS was not an important part of the indoor air quality pollution problem.

The Tobacco Institute gave Robertson an initial contract for $13,000. After this, there was so much work that they wanted him to do what the small company simply could not keep up. Robertson was worn out and started hiring more and more people, being less careful about the checks he made on them. This was how he came to employ Seckler, the plaintiff in this action. By this time the company was going to federal buildings to carry out inspections. These were done fraudulently and results were manipulated by, for example, putting the equipment in front of ventilators, and also subsequently altering the reports. It was notable that the company had never found ETS to be a

problem in any one of hundreds of buildings which they had inspected.

In the late 1980s so many states were having hearings on anti-smoking legislation that TI's demands on the company increased further. Seckler was hired and given acting classes by TI. He was then flown all over the country, where he was met by a representative from TI or RJR and told to lie at the various hearings and to pretend to be a concerned businessman. He continued to do so because he was being paid lots of cash. These media tours were big business and were set up and run by the PR company, Fleishman Hillard and the law firm, Covington & Burling.

By the late 80's ACVA could not keep up with the volume of new business they were generating. Robertson changed the name to Healthy Buildings International and the Company went truly international, with inspections all over the world. Again, the inspectors were always accompanied by a representative of TI or RJR and never found a problem in any of the buildings they inspected. All the inspectors were seduced by the lifestyle they were offered -- staying in five star hotels, going to St. Moritz to ski during the weekends and, in one case, charging weekly expenses of $12,500. Also at about this time there was increased competition for the inspection business from other companies. TI therefore subsidized HBI's tests so that it could undercut its competitors when tendering for business.

Subsequently, hearings began to attempt to ban smoking in airplanes. This prompted some panic at TI and they called HBI asking them to testify on their behalf. There was a meeting at which Seckler attended, where he apparently attempted to dissuade Robertson from testifying at the airplane hearings on the basis that they had no experience in this field. Robertson allegedly said that airplanes were "just buildings that fly". They testified at the hearings and concluded, as usual, that any problems could be solved by increased ventilation.

Someone at Covington & Burling (or possibly Fleishman Hillard) then had an idea to make HBI truly global. They took the view that the U.S. was a relatively small market where little progress could be made on IAQ issues, because of the strong anti-smoking movement. They therefore proposed that HBI magazine should be promoted in Europe, Africa and Southeast Asia, which were behind the U.S. in this regard, and where there were less likely to be smoking bans. Although he had no specific documents to show this, he had heard from several individuals that Philip Morris edited the magazine, and that TI helped to fund it and had some control. Covington & Burling administered it and "kept an eye" on things generally, and promoted the magazine in different countries. The publishing costs of this magazine were between $4-600,000 per year, in excess of HBI's annual turnover. The mailing list of the magazine was

very telling, and included many Senators and Congressmen and policy making bodies.

He had also heard from witnesses (but again had no documents to back this up) that money from the tobacco industry went through Covington & Burling to pay for the magazine. On one occasion HBI allegedly had many bills stacked up for costs incurred in relation to the magazine. One of the women employees said that she had not yet received a check, as Covington & Burling was sitting on it. She called them and complained. This was particularly interesting in the light of all the recent information about the role that law firms play in the tobacco industry. It also appeared that all articles to be published in the magazine went to Philip Morris for editing.

In 1992 Seckler went to the press and appeared on NBC. The magazine was killed shortly after and it is alleged that HBI destroyed many of its documents relating to its dealings with the tobacco industry. HBI had also previously had plans to open eight national offices. The first one had been in Massachusetts, and Seckler had been sent there to get it started. This plan collapsed after the NBC story.

One of the ironies of this case was that HBI had examined many federal buildings, including the Supreme Court, the Health and Human Services building and the Surgeon General's offices, and had then used this fact in

their promotional literature. It now appeared that all of these inspections were fraudulent.

Pires said that he had initially turned this case down when Seckler had come to him because he did not believe in it. He had been forced to reform his view when more people came forward. (A comment which is, at best, disingenuous, bearing in mind his involvement with Seckler's plan to launch the BEST Institute, when he was first asked to leave HBI.) He had sent the matter to the Justice Department (where he had worked for eight years), and they said that it was interesting but that there was not enough cash in it for them to take it forward. They had asked him to run with it and had said that they would step back in if the matter heated up. He said that he was currently before Judge Bryant, and it was clear that the judge also did not believe in the case. He was to make a ruling on November 7th on the future progress of the action. However, everyone's views had changed somewhat after the publication of the Waxman report, where they had obtained actual inspection documents shown to contain all kinds of errors.

He then referred to a study of New York non-government buildings called the PASS study (discussed at pages 260-261 of the materials). TI had called HBI in 1988 in relation to the proposed banning of smoking in restaurants in New York City. Six or seven HBI technicians were flown to work with representatives from TI, RJR, and

Lorillard. They were each issued black briefcases containing air quality testing equipment. They went to each restaurant or office and turned the briefcase on for an hour, collecting nicotine samples etc., and then returned to the industry's computer center in the Regency Hotel on Park Avenue where the data was unloaded. At no time did HBI reveal to anyone that they were working for the tobacco industry. One of the inspectors had kept the business cards of all the tobacco industry representatives he had met at this time.

Pires said that he was not particularly worried about obtaining relevant documents, but was more interested in pressing ahead to trial. This was not a big bucks case, but was important as evidence of the tobacco industry's general behavior.

He thought it was possible that this would open the way to new suits from the various workers in the buildings that had been fraudulently inspected. In this regard, he mentioned that he had approached a developer in Washington for whom HBI had carried out a number of inspections which all appeared to be fraudulent. He was told by the developer that the inspections had been needed to set up refinancing for the building. They had been pleasantly surprised that the inspections were all perfect, even though they thought that they had Sick Building Syndrome problems. They would now not come forward to

testify as they did not want to jeopardize the refinancing by questioning the inspections.

Pires concluded by saying that he had been pressing for a criminal investigation on this matter. He had not been able to interest the authorities as yet, but the FBI had let him know that they were keeping tabs on the matter generally.

9. Nicotine Manipulation -- Clifford Douglas

Douglas effectively repeated many things that had been said in previous talks on the nicotine addiction issue. He discussed the fact that tobacco executives could have chosen to remove nicotine from cigarettes years ago and save thousands of lives, but chose not to. He compared the use of nicotine to the use of cocaine in Coca-Cola at the beginning of the century. Cocaine had been removed from the leaf (where it occurred naturally, as with nicotine) but the product continued to sell. If nicotine was simply there for flavor, as the executives suggested, why could they not pick something else to replicate it?

He then went over the executives' testimony at the Waxman hearings, the claims in Castano, the Brown and Williamson documents, the Meehan memorandum and discussed briefly the ABC litigation. He read out the "apology" from ABC and discussed its inadequacy. He said that Philip Morris had focused on the fact that ABC had apologized for the spiking allegations but that the word "spiking" had only

been used once in the program. It was all an attempt to deflect attention from the main issue of manipulation.

In relation to the criminal prosecution, he said he knew what he had asked the Justice Department to do, but did not know what they were actually doing. He discussed the allegations set out in the Prosection Memorandum (e.g. perjury, mail fraud, deception of the public, conspiracy, false advertising etc.) and said that these were specifically directed at Philip Morris and RJR.

He then returned to the issue of whether the tobacco executives perjured themselves before Waxman, and emphasized that they had said that they did not <u>believe</u> nicotine to be addictive. Other statements of fact that they had made lent themselves more easily to allegations of perjury. For example, the RJR executive had said that RJR did not manipulate nicotine levels to addict smokers, but rather that they reduced it. When asked about the use of tobacco extract, Johnson had said that, to his knowledge, RJR did not use it. He said that a spray dried extract had been used in the Premier brand, but was not used in Winston or Camel. However, studies had shown that certain of his products had up to 70% nicotine in the reconstituted tobacco which was added, when it should naturally have had only 20-25%. Researchers had given evidence that they were certain that RJR had fortified the nicotine levels.

RJR had also attempted to market a new product -- Eclipse, as disclosed by the New York Times. This contained a charcoal element which heated but did not burn the contents of the cigarette. Based on the patents available, it was clear that the nicotine content in the cigarette had been manipulated in several ways. RJR had added specially blended nicotine leaves near the filter (containing 4-5% nicotine as opposed to the usual 1-2%), had added potassium carbonate to change the pH of the cigarette, and transferred the nicotine by vapor rather than by tobacco smoke, so that it was not detectable in FTC tests. Also, as was quite common, the cigarettes had contained nearly invisible smoke vent holes which would be covered by the fingers on smoking, but were not covered by the FTC test machines.

10. <u>The Role of Press Coverage - Panel discussion</u>

Each of the panel discussed their experiences with the tobacco industry, mainly centering on the industry's failure to disclose information, grant interviews etc. Everyone had the impression that things had heated up considerably as the result of the Waxman hearings and the Day One litigation. This was generally a rehash of points previously discussed. I left before the end of the questions from the floor.

Gillian Turner